RESPONDEAT SUPERIOR IN ADMIRALTY.

THAT there could hardly be greater injustice than to take A's property and give it to B because C has injured B seems clear, yet that is the result of the maxim *respondeat superior* plainly stated. It does not help the matter to explain that C was A's servant and was doing A's work at the time, if no fault can be brought home to A, either in the selection of his servant or in any other way. If this same act of C's is criminal, logic requires that A should also be liable criminally for the same act of his servant, but our courts have never gone so far as that. The common law courts have, however, carried this doctrine, according to Sir George Jessel, Master of the Rolls, "very far indeed," "quite far enough,"[1] and have been at times at great pains to introduce exceptions, mitigating the harshness and severity of it, whenever they could, as, for example, denying the liability of the master to a servant for negligence of a fellow servant. Mr. Justice Holmes, in two articles on Agency in the HARVARD LAW REVIEW,[2] shows clearly the injustice of the maxim, and says in effect that it is a legal fiction resting on no ground of logic or good sense, but so entwined into our common law as to be ineradicable; that the reasons given for it by judges are neither good nor consistent. It would seem, then, that there should be no desire on the part of any one to extend a doctrine so unjust, but that the object should be to keep it within its present limits or even to restrict it. Judge Ware, in the case of The Rebecca,[3] discusses admirably the question as a matter of natural law and justice, and says: "But as it is a rule founded merely in expediency and not in natural justice, except so far as the principal has derived a benefit from such acts, *public policy* must also determine to what cases the rule shall extend."

The purpose of this paper is to show that the doctrine has no place in the admiralty law, and that nevertheless it has been quite recently inadvertently and unnecessarily introduced and carried by the admiralty courts in certain directions even farther than at

[1] Smith *v.* Keal, 9 Q. B. D. 351.
[2] 4 HARV. L. REV. 345; 5 *ibid.* 1.
[3] 1 Ware 187, at 206.

common law, and that, having imported the doctrine in recent years into the maritime jurisprudence, the admiralty courts are now applying common law rules in trying to limit it, instead of applying at the outset the rules of the admiralty law governing such cases, which have been nicely adjusted and made uniform in various countries during centuries of commercial intercourse.

Actions in admiralty are divided into two great classes, actions *in rem* and actions *in personam*. Actions arising *ex delicto* may be brought either *in rem* or *in personam*. It is only with actions arising *ex delicto* that we need concern ourselves, for *respondeat superior* in its proper sense does not apply in any other kind of action. Now, in actions *in rem* in admiralty for damage, or *ex delicto*, the liability of the *res* is a thing by itself, peculiar, unlike anything at common law: the *res* is personified, is sued and proceeded against and brought into the custody of the court, and is held liable on grounds which are entirely distinct and apart from the fault or liability of the owners. The liability of the *res* and that of its owners *in personam* are by no means coextensive and identical.[1] For instance, a vessel under charter, though navigated by the charterer and his crew, is liable *in rem* for a collision, but the owners of the vessel would not be liable *in personam*.[2] The vessel is treated as "an offending thing," and is liable *in rem* to those whom she injures without regard to the persons who are navigating her. The liability *in rem* does not depend upon the liability of her owners resting upon their responsibility for the acts of their servants. In other words, the liability does not rest upon *respondeat superior* at all. Judge John Lowell even went so far as to say that if a ship were stolen from her owners and navigated by pirates, she would be liable *in rem* for a collision occurring while so navigated, if she could be shown to have been violating the rules of safe navigation.[3]

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[1] Workman *v.* New York City, 179 U. S. 552, 573; Crisp *v.* U. S., etc., S. S. Co., 124 Fed. Rep. 748, 749.

[2] Clifford, J. in The China, 7 Wall. (U. S.) 53–70; Homer Ramsdell Co. *v.* Compagnie, etc., 63 Fed. Rep. 845, 851; The F. C. Latrobe, 28 Fed. Rep. 377–379.

[3] The Arturo, 6 Fed. Rep. 308, 313; The Malek Adhel, 2 How. (U. S.) 210, 233, 234; Sherlock *v.* Alling, 93 U. S. 99, 108; The China, 7 Wall. (U. S.) 53, 68; Ralli *v.* Troop, 157 U. S. 386, 402, 403; The John G. Stevens, 170 U. S. 113, 120; Workman *v.* New York City, etc, 179 U. S. 552, 573; The Barnstable, 181 U. S. 464, 467, 468; The Bulley, 138 Fed. Rep. 170; Henderson *v.* Cleveland, 93 Fed. Rep. 844, 846, 847; Thompson Nav. Co. *v.* Chicago, 79 Fed. Rep. 984, 985; The Belknap, 2 Low. 281–283; The R. B Forbes, 1 Sprague (U. S. Dist. Ct.) 328; The Ticonderoga, Swa. Ad. 215; The Ruby Queen, Lush. 266.

A careful perusal of the authorities above referred to cannot fail to convince any one that the liability *in rem ex delicto* in the admiralty has no connection with the law of master and servant or with the maxim *respondeat superior.*

Actions *in personam* in admiralty are much less common than actions *in rem.* It is so much easier to arrest the *res* and at once get good security, a sale if necessary, clear of all prior liens, and avoid all embarrassing questions as to joinder of parties, ownership, etc., that it is always done when it is possible. Still it is sometimes necessary to proceed *in personam*, and in these cases also in recent times our courts of admiralty (certainly the lower ones) have inadvertently and unnecessarily as it seems, introduced and expanded the doctrine of *respondeat superior.*

"The maritime law as to the position and powers of the master and the responsibility of the vessel is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally the primary liability was upon the vessel, and that of the owner was not personal but merely incidental to the ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors." [1]

But later, for convenience, a personal liability was admitted, which the owner could limit to the value of his share in the vessel.[2] This personal liability, however, was not coextensive with the liability *in rem*.[3] And it did not depend upon the civil nor common law of master and servant, nor upon the maxim *respondeat superior*, as shown above.

Judge Story lays down the rule for this class of actions in The Marianna Flora,[4] repeated in The Palmyra,[5] and approved by Judge Blatchford delivering the opinion of the Supreme Court in The Max Morris.[6] It is this:

In cases of marine torts courts of admiralty exercise a conscientious discretion, give or withhold damages upon enlarged princi-

[1] Mr. Justice Swayne in the case of The China, 7 Wall. (U. S.) 53, 68; repeated by Mr. Justice Gray in The John G. Stevens, 170 U. S. 113, 122; and in Homer Ramsdell Co. *v.* Comp. Gen. Trans., 182 U. S. 406, 413. See also The Rebecca, Ware 187; The Bulley, 138 Fed. Rep. 170, 172, 173; The F. C. Latrobe, 28 Fed. Rep. 377-379; Ralli *v.* Troop, *supra.*

[2] The Rebecca, Ware 187; 15th Adm. Rule of Sup. Ct. of U. S.; The F. C. Latrobe, 28 Fed. Rep. 377-379; Henderson *v.* Cleveland, 93 Fed. Rep. 846, 847; Admiralty Rule 54 *et seq.*

[3] Workman *v.* New York City, 179 U. S. 552, 573; The F. C. Latrobe, *supra.*

[4] 11 Wheat. (U. S.) 1, 54. [5] 12 Wheat. (U. S.) 1, 17. [6] 137 U. S. 1, 13.

ples of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law.

This does not mean, of course, that the conscience and discretion of the judge are substituted for definite rules of law. Such a construction would be contrary to all our ideas and traditions; but it certainly does mean that the narrow and technical rules of the common law should not be brought in, where the more liberal and elastic rules of the admiralty are as just and effective, and that these rigid and narrow rules did not then obtain in admiralty, so far as marine torts were concerned.[1]

We come, then, to consider what are some of the admiralty rules governing the liability of ship-owners *in personam* in actions *ex delicto*, if *respondeat superior* is not the rule in that jurisprudence. The original liability in marine torts was only *in rem*, as shown above. This liability has now been extended to embrace actions *in personam*, for damage occurring through the negligence of the owners themselves or with their privity, and actions *in personam* for damage occurring by collision caused by bad navigation of the ship, *if navigated by the servants of the ship-owners*. This last extension, however, is rather one of convenience and conscientious discretion, giving the injured party a greater opportunity to get jurisdiction of the offender, and at the same time limiting the doctrine of the offending thing, and it is not to be regarded as a general introduction of *respondeat superior* into the admiralty jurisprudence.

In collision cases the owner is liable *in personam*, if the ship is being navigated by the owner or his servants, on the ground *sic utere tuo ut alienum non laedas*,[2] *not* on the ground of *respondeat superior*. If it is navigated by a charterer or his servants or a compulsory pilot, the owner is not liable *in personam* because he is not navigating the ship, but it is only to collision cases that this rule applies, and it is not on the ground of *respondeat superior*, as

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[1] Judge Choate says, in Homer Ramsdell Co. *v.* Comp. Gen. Trans., 63 Fed. Rep. 845, 854, that the liability of the owners *in personam* is the same in admiralty as at common law, and cites The Germania (9 Ben. 356); but this is a mistake, *e. g.*, they are liable in admiralty for one-half damages, though the libellant is guilty of contributory negligence. The Max Morris, 137 U. S. 1, 15.

They are not liable in admiralty for damages to a seaman injured by negligence of master, but only for maintenance and cure. The Osceola, 189 U. S. 158.

(These were actions *in rem*, but the reasoning and language cover equally actions *in personam*.) See also Workman *v.* New York City, etc., 179 U. S. 552, 562, 563.

[2] The China, *ubi sup.* at 68.

shown above. The owner is not liable for negligence in other cases of marine *tort* as a general rule, unless he is privy to it.[1]

Eliminating collision cases and all classes of cases mentioned in the note (3), the only case decided by the Supreme Court of the United States, which looks towards a liability of an owner *in personam* for the negligence of his servant, to which he was not privy, is Leathers *v.* Blessing,[2] where a master who was part owner was sued jointly *in personam* with the other part owner for negligence of the master. The decree went against both, but the only thing argued and decided was the question of jurisdiction, whether the tort was maritime; the master was of course liable on the merits because the negligence was his own; the co-owner, it would seem, under the rules above laid down, was not liable. This question, however, was not taken, and the decree was against both.

In actions by seamen against the owners for injuries received in the service of the vessel, we find a liability wholly different from that of the common law, more just, and in conformity with the rule laid down by Judge Story in The Marianna Flora. In this class of cases the seaman is entitled to his maintenance, cure, and wages to the end of the voyage, whether the servants of the owner were negligent or not, and whether the seaman was negligent or not, but not to *damages* unless his injury arose from the unseaworthiness of the ship, or from a failure of the owners to supply and keep in order the proper appliances of the ship. That is to say, the negligence of the owners themselves must be shown in order to warrant a judgment for damages; that they were privy to the negligence causing the injury.[3]

Thus we find that in most actions *in personam ex delicto* "privity" of the owners is the catchword, just as in actions *in rem* "the

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[1] It must be recognized, of course, that in cases by seamen or passengers against the owners of the vessel on which they were, the liability is *quasi ex contractu* and not strictly *respondeat superior;* that this is also the ground of liability in cases of owners or ship's company of a tow against the owners of the tug doing the towing; that in cases of damage brought by ship-owner against dock-owner the liability is also *quasi ex contractu;* that in cases of marine nuisance the ground of liability is *sic utere tuo ut alienum non laedas*, not *respondeat superior;* that in cases of death the liability in admiralty is wholly statutory (The Harrisburg, 119 U. S. 199) and that cases where recovery was not had are cases of *non-respondeat superior* and not of *respondeat superior.*

[2] 105 U. S. 626.

[3] The Osceola, 189 U. S. 158. This doctrine of maintenance and cure was sanctioned in the exercise of a conscientious discretion even as applied to a stevedore in an action *ex delicto*, by the Supreme Court in The Max Morris, 137 U. S. 1, 13.

offending thing" is the catchword. If the owner is privy to the negligence, it is his own negligence for which he is liable, not the negligence of his servant. He is liable not on the ground of *respondeat superior*, but because he is negligent himself. For instance, it has been held that though his ship is liable for the negligence of a pilot taken by compulsion of law, the ship-owner is *not* liable *in personam* because there is no privity.[1] If liable at all *in personam* for negligence to which he is not privy, and as we have seen he is in some cases of collision, he can limit his liability to his interest in the ship and freight, and is liable only in the exercise by the court of a conscientious discretion and upon enlarged principles of justice, and not on the ground of *respondeat superior*.

He is not liable, as a general rule, *in personam ex delicto* for damage occurring through faults of the master and crew in the management of the ship, to which he is in no way privy.[2]

Even in actions arising *ex contractu* this liability of the ship-owner for negligence of the master and crew in the management of the ship, formerly existing, has been done away with by the Harter Act,[3] so far as the contract of carriage is concerned, and it never existed in cases of seamen, as shown above, nor in actions *ex delicto*, excepting in some collision cases, and even in them the ground of the liability is not *respondeat superior*.

We see, then, that the liability in the admiralty for negligence *ex delicto* rests upon grounds entirely distinct and apart from *respondeat superior*, and if this liability is put upon the ground of *respondeat superior*, it naturally leads to much misconception, and the introduction into the admiralty of undesirable and technical doctrines belonging to the common law, such, for instance, as the doctrine of fellow servant wholly transplanted and at variance with the giving or withholding of damages upon enlarged principles of justice and equity according to the rule laid down by Judge Story in The Marianna Flora, a doctrine which has not stood the test of public opinion, and was modified by Lord Campbell's Act in England, and, since then by acts passed by the legislatures of almost every state in the Union, but which unfortunately is being applied to-day by the lower admiralty courts of the United States all over

[1] The China, 7 Wall. (U. S.) 53; Crisp *v.* U. S., etc., S. S. Co., 124 Fed. Rep. 748, 749; Ralli *v.* Troop, *supra*, at 423, 424.

[2] Crisp *v.* U. S., etc., S. S. Co, *supra*.

[3] 27 U. S. Stats. at Large 445.

the country, though it has not yet had the sanction of a decision by the Supreme Court of the United States.[1]

It is to be hoped that it will not receive this sanction for the sake of the purity and uniformity of the maritime law and its just and effective administration, for the admiralty rules applied as they are by the court with a conscientious discretion and upon enlarged principles of justice and equity certainly seem preferable to the unjust rule of *respondeat superior* as limited and restricted by the technical rules of the common law courts.

Then, too, it will be observed that if *respondeat superior* is admitted into the admiralty, while at the same time the compensating defense of contributory negligence is excluded, as it has been since The Max Morris,[2] the result will be that the liability of the owner for the negligence of his servants will be carried in the admiralty much further than it has been at common law, and this is not desirable, as shown in the beginning of this article. It may be true that the doctrine of the offending thing is quite as unjust as *respondeat superior;* perhaps it is more so, but the introduction of *respondeat superior* will not mitigate the harshness of that doctrine, but will only increase the liability of the owner *in personam*, and at the same time tend to breed misconception and confuse the fundamental principles of the admiralty jurisprudence.

It must not be forgotten that in the admiralty the injustice and harshness of the doctrine of "the offending thing" is counterbalanced by limiting the liability of the owner to his interest in the thing: the introduction of some common law doctrines and the exclusion of others will disturb the whole balance of the maritime jurisprudence, which had, itwould seem, been nicely adjusted by the general sense of the commercial world during a number of centuries, and tend to destroy that uniformity of the general maritime law, which is so important in commercial affairs.[3]

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[1] See article in 18 HARV. L. REV. 294, where the modern application of *respondeat superior* in the lower courts is abundantly shown.

[2] 137 U. S. 1.

[3] Mr. Justice White in delivering the opinion of the court in Workman *v.* New York City, etc., 179 U. S. 552, says, at page 565, "That under the general maritime law, where the relation of master and servant exists, an owner of an offending vessel committing a maritime tort is responsible, *under the rule respondeat superior* is elementary," and cites Thorpe *v.* Hammond, 12 Wall. (U. S.) 408, and The Plymouth, 3 Wall. (U. S.) 35. At page 573 the learned justice says: "A recovery can be had *in personam*, however, for

a maritime tort when the relation existing between the owner and the master and crew of the vessel at the time of the negligent collision, was that of master and servant," and cites the same two cases.

The last statement seems to be a correct and accurate statement of the law, and was all that was necessary for the decision of that case. The first seems objectionable, because it includes cases other than collision, and so far as it does so is only a *dictum*, because the case was one of collision and it rests the liability upon *respondeat superior*, which seems, as shown above, to be a mistake. The cases cited do not support the proposition for which they are cited: the first being a case of the owner's own negligence, and the second being decided wholly on the question of jurisdiction and dismissed because the tort was not maritime. It seems likely that the second statement was what the learned justice intended to express when he wrote the first. Certainly the first statement cannot be reconciled with Judge Swayne's statement as to the position and powers of the master under the general maritime law quoted above from the case of The China, a well-considered and leading and often cited case by the Supreme Court upon this subject.

There are some interesting remarks bearing upon this subject in the February number of the Law Magazine and Review, at pp. 209-211, discussing the recent Liverpool Conference of the International Law Association, and showing the diversity of the laws of the different countries in this respect, from which it would appear that the rules of the American admiralty law as expounded up to date by the Supreme Court of the United States are a just and moderate mean, in regard to the liability of ship-owners in actions *ex delicto*.